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Jimmy Flynt, II; Dustin Flynt

# UNITED STATES DISTRICT COURT

## CENTRAL DISTRICT OF CALIFORNIA

LARRY C. FLYNT; LFP VIDEO

GROUP, LLC; and LFP IP, LLC,

Plaintiffs,

v.

FLYNT MEDIA CORPORATION, a

Delaware Corporation; JIMMY FLYNT,

II; DUSTIN FLYNT; and DOES 1

through 10, inclusive,

Defendants.

) CASE NO. CV09-00048 AHM (RZx)

) The Hon. A. Howard Matz

) **DEFENDANTS' NOTICE OF**

) **MOTION AND MOTION FOR**

) **LEAVE TO AMEND DEFENDANTS'**

) **TRIAL WITNESS LIST AND JOINT**

) **EXHIBIT LIST; MEMORANDUM;**

) **DECLARATION OF MINA I.**

) **HAMILTON IN SUPPORT;**

) **[PROPOSED] ORDER THERON**

) Pretrial Conference: Nov. 23, 2009

) Trial: Dec. 8, 2009

1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT on November 23, 2009 at 11:00 a.m. at the final  
3 pretrial conference, or at another time as designated by the Court, in Room 14 of the  
4 above entitled Court, located at 312 N. Spring Street, Los Angeles, California 90012,  
5 Defendants will move the Court for leave to amend its Witness List and to add one  
6 exhibits (Trial Exhibits 414) to the Joint Exhibit List.

7 This Motion is brought on the grounds that new developments have occurred in  
8 this matter since the initial filing in June, 2009 of Defendants' Witness List and the Joint  
9 Exhibit list, pursuant to Local Rule 16-5. Specifically, on October 1, 2009, Magistrate  
10 Judge Timothy S. Hogan from the Southern District of Ohio ordered the deposition of  
11 non-party Jimmy Flynt, Sr. ("Mr. Flynt") to be rescheduled. Mr. Flynt's deposition had  
12 been noticed and commenced on April 13, 2009 but terminated by Plaintiffs' counsel  
13 because Mr. Flynt refused to answer any substantive questions and asserted the Fifth  
14 Amendment privilege. Subsequently, Plaintiffs' counsel filed a motion in the Southern  
15 District of Ohio to compel Mr. Flynt's testimony in this case.

16 On October 9, 2009, upon being advised by Plaintiffs' counsel that it wished to  
17 pursue Mr. Flynt's deposition in light of Magistrate Judge Hogan's ruling, Defendants'  
18 counsel informed Plaintiffs' counsel in writing that it intended to ask Mr. Flynt questions  
19 at the deposition and to add Mr. Flynt to Defendants' witness list. Defendants stipulated  
20 to the deposition taking place after the close of discovery and participated in the  
21 deposition which took place on October 21, 2009. Prior to the deposition, Defendants'  
22 counsel disclosed to Plaintiffs' counsel two additional exhibits that it intended to ask Mr.  
23 Flynt questions regarding, and marked those exhibits in the deposition.

24 When the parties' pre-trial documents were filed in June, 2009, it was unclear  
25 whether Mr. Flynt would be compelled to give testimony in this case. Due to this  
26 uncertainty, Defendants did not list Mr. Flynt on their witness list. However, because  
27 Plaintiffs pursued the deposition and Mr. Flynt has now answered substantive questions  
28 relevant to this case and to Defendants' defenses, including those bearing on the issue

1 of non-willfulness, Defendants seek to add Mr. Flynt as an additional witnesses for trial  
2 and to add one exhibit for trial. The proposed Final Pretrial Conference Order has not  
3 yet been entered by this Court and there is no prejudice to Plaintiffs as a result of these  
4 additions as they were disclosed prior to Mr. Flynt's deposition.

5 Due to Plaintiffs' counsel's refusal to stipulate to an amendment of the Defendants'  
6 witness list and the joint trial exhibit list, Defendants must bring this request for leave  
7 to file the amended lists. The proposed Defendants' Amended Witness List is attached  
8 hereto as Exhibit A. The Defendants request an order granting Defendants leave to file  
9 Exhibit A and instructing Plaintiffs' counsel to cooperate in the filing of an Amended  
10 Joint Exhibit List which allows Defendants to list Exhibit 414, already marked at the  
11 deposition of Mr. Flynt.

12 This motion is based upon this Application, the attached Memorandum, the  
13 Declaration of Mina I. Hamilton attached hereto and upon all pleadings and papers on  
14 file herein, and any arguments of counsel that the Court may consider at the pretrial  
15 conference or thereafter.

16  
17 DATED: November 18, 2009 Respectfully submitted,

18 LEWIS BRISBOIS BISGAARD & SMITH LLP

19  
20 By: \_\_\_\_/s/Mina I. Hamilton\_\_\_\_

21 Daniel C. Decarlo, Esq.  
22 Mina I. Hamilton, Esq.

23 Attorneys for Defendants  
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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION AND BACKGROUND

This case was initially set for a final pretrial conference on July 13, 2009. The parties submitted their pre-trial filings on or before June 29, 2009 pursuant to Local Rule 16-5, which included Defendants' Witness List (Docket # 67) and the Joint Exhibit List (Docket #68). Subsequently, the Court on its own motion vacated the July 13, 2009, final pretrial conference date (Docket #88) and eventually re-set the final pretrial conference for November 23, 2009, and trial for December 8, 2009 (Docket #90).

When the parties' pre-trial documents were filed in June, 2009, it was unclear whether Jimmy Flynt, Sr. ("Mr. Flynt"), the father of Defendants Dustin and Jimmy Flynt, would be compelled to give testimony in this case by the District Court in Ohio. Mr. Flynt's deposition had commenced in Ohio on April 13, 2009 but was terminated by Plaintiffs' counsel because Mr. Flynt refused to answer any substantive questions and asserted the Fifth Amendment privilege (Docket #91). On October 1, 2009, subsequent to the filing of Defendants' Witness List and the Joint Exhibit list, Magistrate Judge Timothy S. Hogan from the Southern District of Ohio ordered Mr. Flynt to answer questions at another deposition session. (Id.)

On or about October 9, 2009, upon being advised by Plaintiffs' counsel that Plaintiffs wished to pursue Mr. Flynt's deposition after the close of discovery in this case, Defendants' counsel informed Plaintiffs' counsel in writing via email that it intended to ask Mr. Flynt questions at the deposition and to add Mr. Flynt to its trial witness list. (See, Declaration of Mina I. Hamilton, ¶ 3, Exhibit B (email).

The deposition of Mr. Flynt took place on October 21, 2009 and counsel for both Plaintiffs and Defendants asked substantive questions of Mr. Flynt and received substantive responses. (Id. at ¶ 4, Exhibit C (deposition transcript)).

Defendants' counsel had disclosed to Plaintiffs' counsel two additional exhibits prior to the deposition of Mr. Flynt, and those exhibits were marked at Mr. Flynt's deposition, including one identified as Trial Exhibit 414, which consists of six

1 photographs of the inside of Hustler-branded retail stores, showing the slogan that Mr.  
 2 Flynt coined, "RELAX...IT'S JUST SEX - Jimmy Flynt". Defendants would like this  
 3 exhibit to be added to their list in the Joint Exhibit List, but Plaintiffs have refused to  
 4 stipulate to filing an amended joint exhibit list. (Id.)

5 Because Plaintiffs pursued the deposition of Mr. Flynt after the submission of the  
 6 parties' initial pre-trial filings, and Mr. Flynt has now answered substantive questions  
 7 relevant to this case, Defendants seek to add Mr. Flynt as an additional witnesses for  
 8 trial. In addition, Defendants wish to add one of the two exhibits they marked at his  
 9 deposition to their exhibit list.<sup>1/</sup> The proposed Final Pretrial Conference Order has not  
 10 yet been entered by this Court and there is no prejudice to Plaintiffs as a result of these  
 11 additions as Plaintiffs were able to cross examine Mr. Flynt at his deposition. (Id.)

12 **II. GOOD CAUSE EXIST FOR AN ORDER GRANTING DEFENDANTS**  
 13 **LEAVE TO AMEND THEIR WITNESS AND EXHIBIT LISTS**

14 Preliminarily, Defendants believe that the requested amendments would be  
 15 admissible at least for impeachment purposes. Since the Federal Rules do not require a  
 16 party to disclose witnesses or evidence if they are to be used for impeachment purposes  
 17 only, Defendants can still presumably bring the amendments into evidence. However,  
 18 in an attempt to be absolutely transparent and to avoid any allegations of surprise at trial,  
 19 Defendants would like to amend their already filed witness and exhibit lists prior to the  
 20 Final Pretrial Conference Order being entered by the Court.

21 Significantly, Plaintiffs will suffer absolutely no prejudice due to Defendants'  
 22 amendments. Defendants disclosed to Plaintiffs their intent to add Mr. Flynt as a witness  
 23 and the additional exhibit prior to the deposition of Mr. Flynt on October 9, 2009, soon  
 24 after Defendants discovered that Plaintiffs intended to pursue Mr. Flynt's deposition  
 25  
 26

27 <sup>1/</sup> Moreover, the filed Joint Exhibit List specifically states that the "parties  
 28 reserve their rights to supplement the exhibits . . . if it becomes necessary... prior to  
 the filing of the Final Pre-trial Conference Order (Docket #68).

**DECLARATION OF MINA I. HAMILTON**

I, Mina I. Hamilton, declare and state as follows:

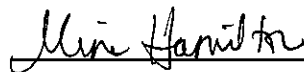
1. I am an attorney duly licensed to practice in all of the courts of the State of California. I am a partner with the firm of Lewis Brisbois Bisgaard & Smith LLP, attorneys of record for Defendants in the above-referenced matter. I have personal knowledge of the facts set forth herein, and if called upon, could competently testify thereto.

2. Attached hereto as Exhibit "A" is a true and correct copy of the proposed Defendants' Amended Witness List.

3. Attached hereto as Exhibit "B" is a true and correct copy of an email Defendants' counsel Mr. Daniel C. Decarlo sent to Plaintiffs' counsel on October 9, 2009. I received a copy of said email.

4. Attached hereto as Exhibit "C" is a true and correct copy of the deposition transcript of Mr. Jimmy Flynt, Sr. taken on October 21, 2009 as well as Defendants' proposed Trial Exhibit 414. Plaintiffs' counsel has refused to stipulate to allowing Defendants' to add this exhibit to their trial exhibit list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 18th day of November, 2009, at Los Angeles, California.



Mina I. Hamilton